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Consumer Protection Violations in Massachusetts Nursing Home Admission Agreements

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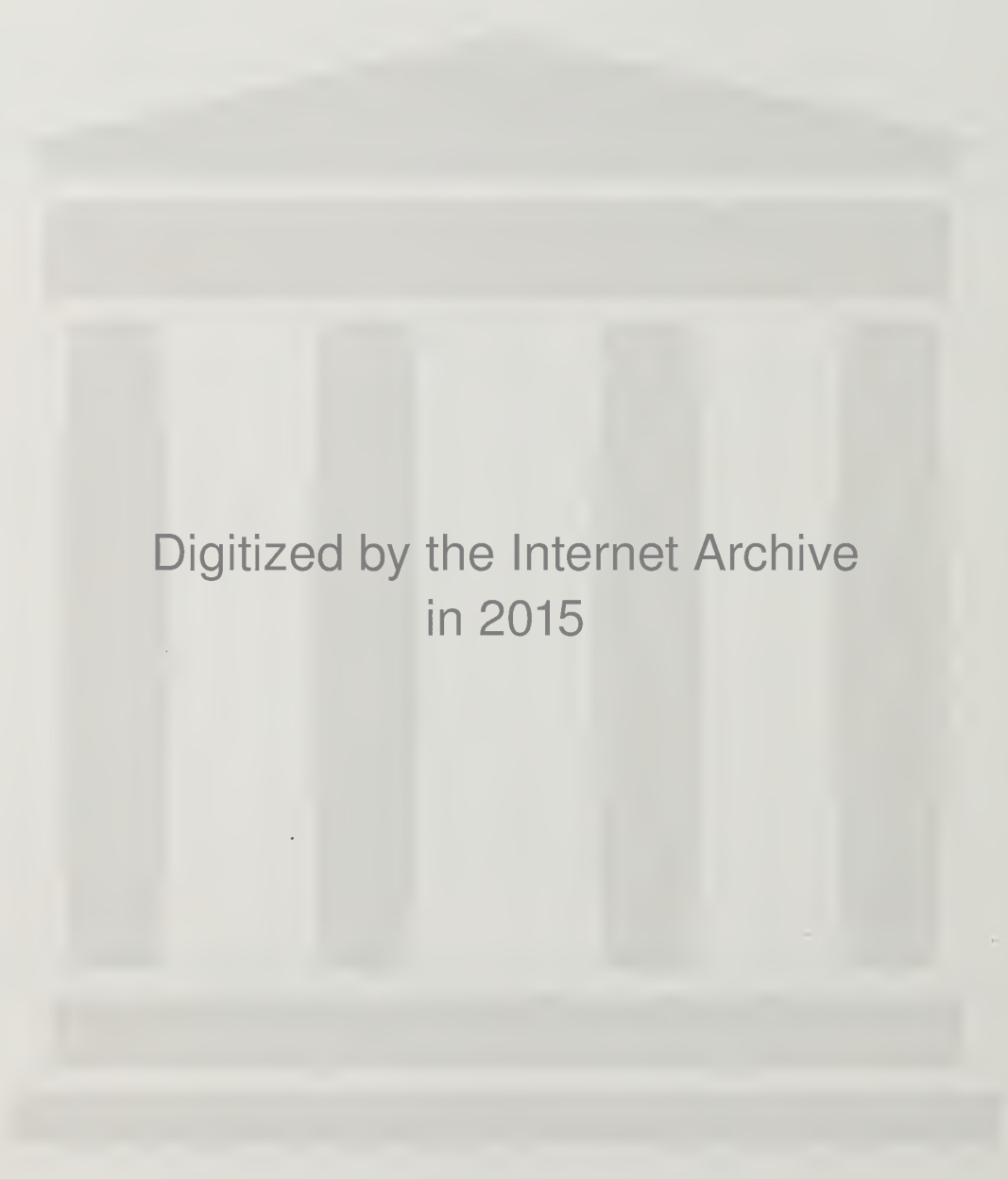
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CHECK YOUR RIGHTS AT THE DOOR

Consumer Protection Violations in Massachusetts Nursing Home Admission Agreements

EXECUTIVE SUMMARY

Nursing home residents and their family members often rely heavily upon the nursing home, not only for care, but for information. The admission agreement, for example, is an important document that defines the business relationship among the resident, family, and nursing home.

Misleading information in such agreements makes it difficult to make informed choices about admission to a facility. It also has a chilling effect on the exercise by residents of their rights under the law. The impact of inaccurate and misleading information in admission agreements is magnified by the fact that the admissions process is often profoundly stressful for the both the resident and the resident's family. Even the most well-informed and sophisticated consumer is usually ill-prepared to navigate the maze of the admission process.

In the fall of 1996, through a course entitled "The Rights of Nursing Home Residents" at the University of Massachusetts Boston's Gerontology Institute, a study on nursing home admission agreements was undertaken. The purpose of the study was to measure the compliance of Massachusetts nursing homes with federal and state law concerning the rights of residents, as reflected in the facilities' admission agreements.

All 45 agreements examined in this study contained certain provisions that the facilities knew or should have known to be invalid or likely to confuse or deceive residents and their family members, thus depriving them of the protections afforded by the Nursing Home Reform Law and the Massachusetts Consumer Protection Act. More specifically,

- 38 percent of the agreements impermissibly limit facilities' liability for personal injury.
- 31 percent of the agreements impermissibly limit facilities' liability for physicians' actions.
- 67 percent of the agreements impermissibly limit facilities' liability for loss or damage to personal property.

- 44 percent of the agreements disclaim or are silent regarding limitations on involuntary discharges or transfers of residents.
- 89 percent of the agreements contain one or more grounds for discharge or transfer that are impermissible under the Nursing Home Reform Law.
- Of the facilities that are Medicare-certified, 80 percent disclaim or are silent regarding the resident's right to refuse an involuntary transfer from a Medicare-certified bed.
- 13 percent of the facilities impermissibly require a third-party guarantor or agent for the resident.
- 87 percent of the agreements improperly seek the signature of a "voluntary responsible party," despite the fact that such an agreement would provide no benefit to the resident, family member, or friend.
- 27 percent of the agreements impermissibly require the resident or family member to pay the costs of collection and attorney's fees.
- 42 percent of the agreements disclaim or are silent concerning the resident's right to choose a physician.
- 78 percent of the agreements disclaim or are silent concerning the resident's right to choose a pharmacy.
- 18 percent of the agreements fail to notify the resident of the charges for services included in the daily rate.
- 84 percent of the agreements fail to notify the resident of the charges for services not included in the daily rate.

These findings are of concern to consumer advocates for several reasons. The agreements are prepared or approved by the management (and, in some cases, counsel) for the facilities, and thus represent facility policy. If the contracts contain unlawful terms, it is a reasonable conclusion that the facility's practices conflict with existing law as well. The prevalence of misleading provisions causes misunderstandings and conflicts between the facility administration and staff on the one hand, and the resident and family members on the other hand.

The fact that a court would ultimately find certain provisions unenforceable is cold comfort in the context of nursing home care. The presence of misleading information in the agreements is likely to discourage residents or their family members from challenging a facility's improper practices or pursuing a valid claim for damages. The public policy that a nursing facility should truly be a "home" is violated if residents and their families have to resort to litigation in order to resolve disputes.

The following recommendations are offered:

- Information should continue to be made available to consumers by the Executive Office of Elder Affairs and the Massachusetts Division of Medical Assistance, among other sources, about the rights afforded to nursing home residents and their family members.
- Armed with this information, residents and their family members may refuse to sign documents presented by nursing homes if the documents contain provisions that conflict with applicable law.
- The nursing home ombudsman program, of the Executive Office of Elder Affairs, should continue its efforts to advocate for residents when disputes arise. When disputes cannot be resolved informally, the ombudsman should inform residents that free legal assistance is available.
- The Massachusetts Department of Public Health, which is responsible for conducting surveys of nursing homes for compliance with the Nursing Home Reform Law, should take steps to prevent nursing homes from misleading consumers. In particular, surveyors should regularly collect admission agreements and, as necessary, consult with the Attorney General to review admission agreements as part of the survey process.
- The Massachusetts Attorney General, in collaboration with the ombudsman's office, advocates for nursing home residents, and the long-term care industry, should develop a standard admission agreement that would be required for all Massachusetts nursing homes. The agreement should present a clear and complete statement of the resident's rights in a form that is "consumer-friendly." The agreement should be clear, concise and legible.

CHECK YOUR RIGHTS AT THE DOOR

Consumer Protection Violations in Massachusetts Nursing Home Admission Agreements

I'm beside myself. I've been running around trying to find another nursing home for my mother. The social worker told me that her Medicare ends tomorrow and I have to move her right away. And the admissions director says that since I signed an agreement that my mother would be a "short-term" patient, it's my responsibility to move her. My mother says she'd rather die than move to another place now.

John Moran¹

The social worker says that my father's behavior is getting worse, and that we have to find another nursing home for him right away. Someone told me that he might be eligible for Medicaid but I'm afraid to apply. The social worker says that I signed an agreement that makes me personally liable for all of the bills. I've been afraid to go through the front door of the nursing home ever since.

Ann Smith

When Mr. Moran contacted the nursing home ombudsman² for help, he was surprised to discover that the nursing home could not simply evict his mother from her Medicare bed against her wishes. Mrs. Smith was similarly surprised to learn from a local legal services attorney that her father's nursing home could not discharge him without providing certain protections, and could not force her to pay her father's bills. In both cases, once the nursing homes were contacted by advocates for the residents, they stopped pressuring the residents' family members.

¹Names and other identifying information have been changed to protect client confidentiality.

²The mission of the Massachusetts long-term care ombudsman program is to investigate and resolve complaints made by or on behalf of residents of long-term care facilities and to advocate for changes needed to improve the residents' quality of life and quality of care. G.L. c. 19A, §§ 27-35.

John Moran has stopped trying to find another nursing home bed and has reassured his mother that she can stay in her home. Ann Smith has started going in the front door of the nursing home again. Most important, their parents were able to exercise their rights to remain in the homes in which they were residing, and were not forced to move against their wishes. But what happens to nursing home residents who have no relatives to advocate on their behalf? What happens to residents whose family members may not be savvy enough to contact an ombudsman or attorney, or who are not able to find one?

In 1987, Congress enacted landmark legislation known as the Nursing Home Reform Law, which requires nursing homes to meet specific standards of care, effective October 1, 1990.³ The legislation represents a major advance in public policy because it recognizes that frail elders continue to have basic rights even after they are institutionalized in nursing homes. The Nursing Home Reform Law, also known as "OBRA 87," imposes high standards for the quality of care and quality of life of residents, and applies to all facilities that accept either Medicare or Medicaid.

Central to the Nursing Home Reform Law are protections of nursing home residents' rights, including, for example, the right to be free from abuse, neglect, or mistreatment; the right to make medical treatment decisions; and protections against arbitrary transfers and discharges from a nursing home. To augment those protections, the Massachusetts Attorney General promulgated comprehensive consumer regulations for nursing home residents, effective October 21, 1994.⁴ These regulations were promulgated under the Massachusetts Consumer Protection Act.⁵ They apply both to facilities that accept Medicaid and Medicare coverage and those that do not.

Nursing home residents have the right to live their lives with dignity and security. Legal guarantees of nursing home residents' rights are premised on the fundamental principle that the nursing home is genuinely a "home" for the residents. Residents and their family members have the right to accurate and clear information about residents' rights. As one nursing home brochure states: "When you leave your home to come and live at [the facility], you [bring] your rights with you." Nevertheless, in most cases, residents and their family members know only what the nursing home tells them about their rights. Therefore, nursing home admission documents, along with other written policies, should state the rights of residents accurately.

³Pub. L. 100-203, 42 U.S.C. §§ 1395i-3(a)-(h) and 1396r(a)-(h), Medicare and Medicaid, respectively, enacted as part of the Omnibus Budget Reconciliation Act of 1987.

⁴940 CMR 4.00.

⁵G.L. c. 93A.

PURPOSE OF THE STUDY

The purpose of this study was to measure Massachusetts nursing homes' compliance with federal and state law concerning residents' rights, as reflected in the facilities' admission agreements. It was hoped that the study would serve to educate current and future nursing home residents, and their family members and other advocates, about the rights of residents. The study was also designed to encourage facilities to bring their admission agreements into compliance with laws governing residents' rights.

Misleading or incomplete information in nursing home admission agreements makes it difficult for prospective residents and their families to make informed choices about admission to a facility. It also has a chilling effect on the exercise by residents of their rights under federal and state law. As the population of frail elders continues to grow, increasing numbers of families are seeking access to long-term care. The number of elderly people needing nursing home care is expected to nearly triple between 1990 and 2030.⁶ As the number of families facing nursing home placement grows, the issue of consumer protection for nursing home residents assumes increasing importance.

The impact of inaccurate and misleading information in admission agreements, for example, is magnified by the fact that the nursing home admission process is often profoundly stressful for both the resident and the resident's family. Family members are often pressured to move quickly. Even the most well-informed and sophisticated consumer is usually ill-prepared to navigate the maze of the admission process. By definition, the prospective resident herself needs skilled care and is dependent on others for assistance with basic activities of daily living. The resident's family members are often in a state of emotional and physical vulnerability at the point of nursing home placement, either from the stress of having been caregivers for a frail elder, or as a result of the pressure exerted by hospital discharge planners to find a nursing home bed immediately because of Medicare and managed care policies.⁷ Prospective residents with little income and few assets have the most difficult time finding a nursing home bed.⁸

⁶Coughlin, Ken, "The Changing Demographics of Elder Law: A Look Ahead," The ElderLaw Report, Vol. VIII, No. 6 (January 1997).

⁷Access to Nursing Homes – The Experience of Families. Gerontology Program and Institute, University of Massachusetts at Boston, 7-25 (1986).

⁸Id.

It is in this context that residents and family members are given an admission package and asked to "sign here." The admission agreement is an important document that defines the business relationship among the resident, family member (referred to as "responsible party" in the admission agreements), and nursing home. The agreement should be an expression of the respective rights and responsibilities of the parties. In fact, however, the contracts are pre-printed contracts of adhesion, offered on a "take it or leave it" basis. There is typically no opportunity for negotiation between the parties. Because nursing home residents and their families are so vulnerable during the admission process, the free market paradigm of an informed consumer shopping for services does not apply during the nursing home admission process.⁹

The agreements examined in this study contain provisions that the facilities knew or should have known to be either specifically prohibited by law or likely to confuse or deceive residents and their family members.¹⁰ For example, 89 percent of the agreements in this study contain grounds for discharging or transferring a resident that are not permitted under the Nursing Home Reform Law. More than a third of the agreements impermissibly limit the facilities' liability for personal injury to residents.

Consumer advocates find these agreements troubling for a number of reasons. The agreements are prepared or approved by the management (and, in some cases, counsel) for the facilities, and thus represent facility policy. If the contracts contain unlawful terms, a reasonable conclusion is that the facility's practices conflict with existing law as well. The prevalence of invalid provisions causes misunderstandings and conflicts between the facility administration and staff on the one hand, and the resident and family members on the other hand.

⁹Family members have reported that, during the admission process, they are simply handed a stack of papers and asked to sign a number of them, with no opportunity for explanation or negotiation. See examples cited in Podolsky v. First Healthcare Corporation, 58 Cal. Rptr. 2d 89, 92-94 (Cal. App. 2 Dist. 1996).

¹⁰Studies of nursing home admission agreements in other states have found that the agreements typically contain unlawful or misleading terms. See Bet Tzedek Legal Services, "If Only I Had Known:" Misrepresentations by Nursing Homes Which Deprive Residents of Legal Protection (1995) (Los Angeles, California), and reports cited at page 9 and notes 20-26 (California, Maine, Louisiana, North Dakota, and Maryland); Kisor, Anne J., "Nursing Facility Admission Agreements: An Analysis of Selected Content," Journal of Applied Gerontology, Vol. 15, No. 3, 294 (1996) (Virginia); Ambrogio, Donna Myers, and Leonard, Frances, "The Impact of Nursing Home Admission Agreements on Resident Autonomy," Gerontologist, Vol. 28, 82 (Supp. 1988) (California); Advocacy Assistance Program, Long-Term Care Admission Agreements in Colorado: A Review (1985) (Colorado). See generally Sabatino, Charles, "Nursing Home Admission Contracts: Undermining Rights the Old-Fashioned Way," 24 Clearinghouse Rev. 553 (1990) and Nemore, Patricia, "Illegal Terms in Nursing Home Admissions Contracts," 18 Clearinghouse Rev. 1165 (1985).

The fact that a court would ultimately find certain provisions unenforceable is cold comfort in the context of nursing home care for several reasons. First, the presence of misleading information in the agreements is likely to discourage residents or their family members from challenging a facility's improper practices or pursuing a valid claim for damages. Second, it violates the policy of the Nursing Home Reform Law that a nursing facility should truly be a "home" if residents and their families have to resort to litigation and incur legal fees in order to resolve disputes. Finally, a consumer who takes an adversarial approach may ultimately succeed, but at the cost of destroying relationships among people who have to live and work together in the close quarters of a nursing home over an extended period of time.¹¹ Nursing home residents and their advocates are rightly concerned about winning the battle but losing the war.

METHODOLOGY OF THE STUDY

During the fall semester of 1996, students enrolled in a course on "The Rights of Nursing Home Residents" at the Gerontology Institute, University of Massachusetts Boston, obtained admission packets from 45 nursing facilities in the Boston, Massachusetts area. The facilities are located in Suffolk, Middlesex, Norfolk, and Plymouth counties. Of the 45 facilities in the sample, 35 are certified for both the Medicare and Medicaid programs, 8 are certified for the Medicaid program only, and 2 are not certified for either Medicare or Medicaid, but accept only private-pay residents. Of the facilities in the sample, 12 are non-profit and 33 are for-profit facilities.

Most of the students went to local facilities in person and presented a letter of introduction from the course instructor requesting an admission packet, including an admission agreement for a class assignment at the Gerontology Institute. Students reported that the nursing home staff were happy to provide copies of their brochures and other promotional material, but were not as willing to provide copies of the actual admission agreements. In the majority of instances, the admission director or social worker provided the materials requested, some more readily than others. Two facilities refused outright to provide copies of their admission agreements.

The sample admission documents were analyzed and compared with the relevant law to determine the prevalence of certain required terms and the incidence of unlawful terms in the agreements. The content areas reviewed included: information

¹¹See Wood, Erica, and Karp, Naomi, "'Fitting the Forum to the Fuss' in Acute and Long-Term Care Facilities," *Clearinghouse Rev.* 621 (October 1995) (discussing alternative dispute resolution in nursing home and hospital settings).

about waivers of facility liability; the facility's transfer and discharge policies; the role of the resident's "responsible party"; collection costs and attorneys' fees; the resident's right to select a physician and pharmacy; and the facility's charges. These categories were selected because of their importance to consumers and their advocates, and because the Nursing Home Reform Law and the Massachusetts Attorney General's regulations make clear what is required of nursing homes with respect to these issues.

Some admission agreements that contain unlawful provisions are accompanied by a separate summary of "residents' rights" that correctly states the law. For example, a number of agreements contain unlawful grounds for transfer or discharge, although the accompanying handbook or guide to residents' rights clearly sets out only the permissible grounds. Such inconsistencies are likely to create confusion for residents and their family members. If a dispute arises, residents may believe that the agreement and not the residents' rights brochure is binding, even if the agreement's provisions are unlawful, because that is the document the parties signed. For these reasons, if inconsistencies were found between the language of the contract and the accompanying material, the contract language was used in tabulating the results for this study.

The Attorney General's regulations require nursing homes to inform residents, both orally and in writing, of the facility's written policies regarding residents' rights, and to furnish copies of these policies to each resident and his/her legal representative or next of kin, along with a copy of the regulations.¹² The regulations do not specifically require that residents' rights be enumerated in the admission agreement itself. With respect to certain important rights, however, such as those that apply to transfer and discharge, or physician choice, this study calculated the number of agreements that made no mention of those rights, as well as those that expressly acknowledged or disclaimed them.

¹²940 CMR 4.02(2) - (4).

FINDINGS

The review of admission agreements in this study revealed provisions that are invalid under the Nursing Home Reform Law or the Attorney General's regulations, or likely to confuse or deceive residents and their family members. Following are the findings regarding (1) waivers of liability, (2) transfer and discharge, (3) third-party liability, (4) collection costs and attorney's fees, (5) the resident's right to choose a physician and pharmacy, and (6) information about the facility's charges.

I. WAIVERS OF LIABILITY

Under Massachusetts law, a nursing home may not require waivers of liability except under certain circumstances. Specifically, it is a violation of the Massachusetts Consumer Protection Act for a nursing home:

to require a resident or a prospective resident, his/her legal representative or next of kin, as a condition of admission, expedited admission, or continued stay in the facility, to agree to waive or limit the facility's liability for loss of personal property or any injury suffered as a result of negligence on the part of the administrator or of the facility's employees or agents.¹³ (*emphasis added*).

Even though many of the waiver clauses would ultimately be found unenforceable if they were challenged in court, they are harmful nevertheless because they are likely to mislead the average resident or family member, and discourage them from pursuing legitimate claims.

One of the facilities in the sample uses an agreement that contains no impermissible waivers, and provides a resident guide, which states, under the heading "Our Responsibilities":

The facility has the following obligations to our residents, their legal representatives and/or next of kin: . . . not to encourage residents to waive or limit our liability for loss of personal property or any injury a resident may suffer as a result of our negligence.

¹³940 CMR 4.04(3) (*emphasis added*).

This admission packet, which correctly states the law for Massachusetts residents in a consumer-friendly manner, is the exception. As described more fully below, about one third of the agreements analyzed contain impermissible waivers of liability for personal injury or physician malpractice, and about two thirds of the agreements contain impermissible waivers of liability for loss or damage to personal property.

Waiver of Liability for Personal Injury

WAIVER OF LIABILITY FOR PERSONAL INJURY	
Does Not Limit Facility's Liability for Personal Injury to Resident:	28 (62%)
Limits Facility's Liability for Personal Injury to Resident:	17 (38%)

Over a third of the agreements purport to limit the facility's liability for personal injury to the resident. For example, some facilities impermissibly try to limit their liability to acts of gross negligence:

We shall not be liable for injuries of any kind You should have while staying with Us, unless We or our employees are found to be legally grossly negligent.

Other facilities purport to limit or terminate their liability whenever the resident leaves the facility. For example, one facility uses a form that states:

Resident releases Facility from any and all harm, injury or loss suffered by Resident while outside the physical confines of Facility or supervision of Facility staff.

Another facility's agreement states that, "Removal of the Resident from the Nursing Home either temporarily or permanently shall terminate any responsibility on the part of the Nursing Home or its employees."

Such waivers regarding "outside" incidents are no more legitimate than any other waiver. The fact that an injury or illness occurs while the resident is outside the facility does not mean that the facility may not be liable for the harm to the resident. The facility may have been negligent in its care of the resident and that negligence may have been the cause of the resident's injury or illness, regardless of where the injury or

illness occurred. For example, a facility may have negligently failed to provide adequate therapy to a resident, or may have improperly fitted the resident with a walker or crutches, causing the resident to fall.

Waiver of Liability for Actions of Physicians

WAIVER OF LIABILITY FOR PHYSICIANS' ACTIONS	
Does Not Limit Facility's Liability for Physicians' Actions:	31 (69%)
Limits Facility's Liability for Physicians' Actions:	14 (31%)

About a third of the agreements improperly require residents to release the facility from responsibility for the actions of physicians. To the extent that such waivers purport to release a facility from liability for the negligent acts of physicians who are employees or agents of the facility, they are improper under the Attorney General's regulations. For example, one agreement acknowledges the resident's right to choose his or her own physician, and provides that, if the resident's personal physician is not available, the facility will "designate" another physician to provide care. That "designated" physician is likely to be an agent or employee of the facility. Nevertheless, the facility's agreement then states:

The Resident recognizes and agrees that all physicians providing services to the Resident, including those designated by the Facility, are independent contractors. The Resident recognizes and agrees that such physicians are not associates or agents of the Facility, and that the Facility's liability for any physician's act or omission is limited.

Another agreement states:

If Patient's Attending Physician is unavailable, Patient consents to Facility calling, at Patient's expense, any other Physician to attendance when deemed necessary or advisable by the Facility. Facility shall not be liable for any acts or omission of such Physicians, or for any consequences of Facility following the instructions of such Physicians.

If the facility calls in its own medical director, for example, or another physician who is an agent or employee of the facility, the facility cannot require the resident to waive claims for injury caused by that physician's negligence.

Waiver of Responsibility for Personal Property

WAIVER OF LIABILITY FOR PERSONAL PROPERTY	
Does Not Limit Facility's Liability for Personal Property:	15 (33%)
Limits Facility's Liability for Personal Property:	30 (67%)

Two thirds of the agreements impermissibly limit the facility's responsibility for the incoming resident's personal property. One facility uses a form that states:

You agree to be responsible for all valuables, money and other personal property in your possession while You are at our Facility. We are not responsible for your property which may be lost or stolen.

Another agreement states:

The management of this home will not be responsible for any valuables or money left in the possession of this person while he or she is a resident of this home.

Such clauses are improper since they purport to eliminate all liability on the part of the facility, even liability for negligent or intentional acts.

Some agreements use the heading "STANDARD ADMISSION WAIVER" for a clause that purports to limit the facility's liability for loss or damage to personal property. The use of the term "standard" in this heading could lead a reasonable resident or family member to believe that such a waiver is standard throughout the industry, and therefore legitimate and enforceable.

Other agreements suggest that the facility would be responsible for personal property only if it were marked with identification and turned over to the administration for safekeeping. For example, one agreement states:

I understand and agree that any money, jewelry, or other personal or valuable items belonging to me (Patient) should be deposited with [the facility's] cashier for safekeeping and that [the facility] shall not be liable for the loss or damage to any personal property or valuables unless deposited with the [facility's] cashier for safekeeping. [The facility] reserves the right to refuse to accept for safekeeping articles of unusual size or nature.

This provision tends to mislead residents and their families because it suggests incorrectly that they have a viable claim against the facility for damage to property only if they have deposited the property with the cashier for safekeeping.

One facility attempts to limit its liability not by a waiver, but by shortening the deadline for filing a claim to one year and limiting the right of the resident or the resident's insurer to sue the facility:

All actions against Facility directly or indirectly related to Resident's stay in Facility, including actions upon this Agreement, or of tort, or of contract for personal injuries, shall be commenced only within one year after the cause of action accrues. Resident agrees that, with respect to any loss which is covered by insurance being carried by or for Resident, Resident releases Facility of and from any and all claims with respect to such loss; and Resident further agrees that such insurance company shall have no right of subrogation against Facility.

Under Massachusetts law, plaintiffs usually have three years to bring a tort claim,¹⁴ six years to bring a contract claim,¹⁵ and four years to bring a consumer protection claim.¹⁶ Such an overreaching provision violates the spirit, if not the letter, of the Attorney General's regulations.¹⁷

¹⁴G.L. c. 260, §§ 2A, 4.

¹⁵G.L. c. 260, § 2.

¹⁶G.L. c. 260, § 5A.

¹⁷By way of comparison, even where the legislature has permitted a contractual limitation on the period for bringing a suit, it has provided that the period may not be less than two years. See G.L. c. 175, § 22 (insurance policy may not limit time for bringing action against insurance company to less than two years from when cause of action accrues).

II. TRANSFER AND DISCHARGE

In enacting the Nursing Home Reform Law, Congress recognized that a nursing facility should truly be a "home" for its residents. The resident's right to remain in her "home" -- even if the "home" has been reduced to a particular bed in a particular room - can be of critical importance. For a frail elder who has lost her lifelong home and her autonomy, this is sometimes the last stand. Some residents, such as Mrs. Moran, would "rather die" than be forced to move.

Accordingly, the Nursing Home Reform Law curtails a facility's right to evict a resident from the facility or transfer the resident within the facility. A nursing facility must permit each resident to remain in the facility and must not transfer or discharge the resident from the facility unless:

- (i) the transfer or discharge is necessary to meet the resident's welfare and the resident's welfare cannot be met in the facility;
- (ii) the transfer or discharge is appropriate because the resident's health has improved sufficiently so the resident no longer needs the services provided by the facility;
- (iii) the safety of individuals in the facility is endangered;
- (iv) the health of individuals in the facility would otherwise be endangered;
- (v) the resident has failed, after reasonable and appropriate notice, to pay (or to have paid under [the Medicaid or Medicare program] on the resident's behalf) for a stay at the facility; or
- (vi) the facility ceases to operate.¹⁸

In cases described in paragraphs (i) - (iv), the basis for transfer or discharge must be documented in the resident's clinical record, and in cases described in paragraphs (i) and (ii), the documentation must be provided by the resident's personal physician.¹⁹

¹⁸42 U.S.C. §§ 1396r(c)(2)(A) and 1395i-3(c)(2)(A).

¹⁹Id.

Under federal law, a nursing home resident also has the right to refuse a transfer to another room in the facility, if a purpose of the transfer is to relocate the resident from a portion of the facility that is Medicare-certified to a portion that is not Medicare-certified,²⁰ or vice versa.²¹

In addition to the federal protections against arbitrary transfers and discharges, the Massachusetts regulations provide that a facility may not:

move a resident to different living quarters within the facility, contrary to the resident's wishes, except to meet the resident's health care or safety needs which otherwise could not be met, as documented in the resident's clinical record by his/her attending physician.²²

LIMITED GROUNDS FOR TRANSFER OR DISCHARGE	
Acknowledges Limited Permissible Grounds:	25 (56%)
Is Silent Regarding Limited Permissible Grounds:	11 (24%)
Disclaims Limited Permissible Grounds:	9 (20%)

IMPERMISSIBLE GROUNDS FOR TRANSFER OR DISCHARGE	
Contains Impermissible Grounds:	40 (89%)
Does Not Contain Impermissible Grounds:	5 (11%)

Over half of the agreements acknowledge that the facility may discharge or transfer a resident only for certain reasons. At the same time, however, the vast majority of the agreements (89 percent) contain grounds for discharge or transfer that are not permitted under the Nursing Home Reform Law. For example, one agreement

²⁰42 U.S.C. § 1395i-3(c)(1)(A)(x)

²¹42 U.S.C. § 1396r(c)(1)(A)(x).

²²940 CMR 4.09(4).

states that "occasionally there is a need to move a resident . . . [for] medical or social reasons. [The Facility] reserves the right to make appropriate changes as the need arises." Under the agreement of another facility, the resident:

agrees to vacate the Facility upon request for conduct that is uncooperative with the Facility's staff or is disturbing to the welfare or comfort of other patients or the well-being of the Facility.

Residency can be "terminated by either party at any time" and residents can be asked to leave if they do not "meet criteria for residency," according to one agreement. In another, the burden is placed on the resident and responsible party to arrange for immediate discharge:

if the nursing facility finds that the resident is or becomes uncontrollable, markedly uncooperative, or disturbing to the comfort and safety of the other residents.

One facility claims that it may transfer residents for "medical or psychosocial reasons or at the discretion of Administration," and states that this policy applies to married couples, as well as other residents. In addition to violating OBRA 87, this agreement also violates Massachusetts law, which protects the right of married residents living in the same facility to share a room, provided that both spouses consent.²³

In addition, the agreements either ignore or disclaim the requirement that a transfer or discharge for clinical reasons must be documented by the resident's own physician. For example, one agreement states:

A resident will be transferred to another facility or discharged when deemed medically necessary by a physician.

Another facility states that the resident may be discharged if, in the facility's judgment, "the resident's physical or mental condition makes continued residence at the facility inadvisable."

The grounds for transfer and discharge set out in the agreements from this study are generally broader or more ambiguous than the permissible grounds for discharge or transfer under the Nursing Home Reform Law. Many purport to give the facility virtually unlimited discretion to discharge or transfer residents. This practice seriously undermines the rights of residents to be free of arbitrary discharges and transfers.

²³940 CMR 4.06(2).

Right to Refuse Certain Transfers

RESIDENT'S RIGHT TO REFUSE CERTAIN TRANSFERS	
Acknowledges Right to Refuse Certain Transfers:	7 (20%)
Is Silent Regarding Right to Refuse Certain Transfers:	22 (63%)
Disclaims Right to Refuse Certain Transfers:	6 (17%)

Of the 35 facilities that are certified for Medicare, about two thirds fail to inform residents of their right to refuse a transfer if a purpose of the transfer is to relocate the resident from a portion of the facility that is Medicare-certified to a portion that is not Medicare-certified, or vice versa.

For example, in one facility, the resident signs this agreement:

I understand that I am being admitted into a Medicare certified bed because of the skilled care that I require. It is my expectation that the facility will move me to a more appropriate bed when the Medicare coverage ceases. *(emphasis in original)*.

Such provisions purportedly abrogate the resident's right to refuse a transfer from a Medicare-certified to a non-Medicare-certified bed.

III. THIRD-PARTY LIABILITY

Under the Nursing Home Reform Law, nursing homes may not require a third-party guarantee of payment as a condition of a resident's admission or continued stay.²⁴ Under the Attorney General's regulations, it is a violation of the Massachusetts Consumer Protection Act for a nursing home:

(1) to require a resident or a prospective resident, his/her legal representative or next of kin, as a condition of admission, expedited admission, or continued stay in the facility, to provide a third party guarantee of payment to the facility;

²⁴42 U.S.C. §§ 1395i-3(c)(5)(A)(ii), 1396r(c)(5)(A)(ii); 42 C.F.R. § 483.12(d)(2).

(2) to require a resident or a prospective resident, his/her legal representative or next of kin, as a condition of admission, expedited admission, or continued stay in the facility, to designate a third party to be responsible for giving authorization and consent on behalf of any resident, unless such resident has been adjudged incompetent by a court of law.²⁵

REQUIRES THIRD-PARTY GUARANTOR OR AGENT	
Requires Third-Party Guarantor or Agent:	6 (13%)
Improperly Seeks Signature of "Voluntary Responsible Party":	39 (87%)

Of the facilities in the sample, 13 percent require a third-party guarantor for all residents. For example, one agreement states:

Residents may not be admitted without a legal guardian and/or a responsible party to act on the resident's behalf.

Under another agreement, a third party assumes the rights and responsibilities of the resident:

if the resident has been adjudicated incompetent in accordance with state law, is found by his or her physician to be medically incapable of understanding these rights, or exhibits a communication barrier. (*emphasis added*).

Since this agreement requires a third party to assume liability for a resident who has not been found legally incompetent, it violates the Attorney General's regulations.

Those agreements that do not expressly require a third-party guarantor nevertheless improperly seek agreement from a third party to "voluntarily" act as responsible party for the resident. The person signing as "responsible party" receives nothing of value (i.e., no consideration) in exchange for doing so. The term "responsible party" is rarely defined in the admission agreement. Because of the

²⁵940 CMR 4.04(1) and (2). The regulations provide, however, that "nothing in 940 CMR 4.04(1) and (2) should be construed to require that an applicant be admitted who has no source of payment."

stressful atmosphere in which nursing home admissions take place, family members are likely to believe that their signature is required. Such contract clauses were found to violate California's consumer protection statute because of their tendency to deceive residents and their family members.²⁶

A number of agreements state that "responsible parties" are personally liable for the resident's bills for nursing home care. For example, under one agreement:

A Responsible Party will be jointly and severally liable with the Resident for all payments owed to [the facility] by the Resident, it being acknowledged and understood that admission of the Resident is of benefit to the Responsible Party. Joint and several liability means that both the Resident and the Responsible Party are obligated to pay all the charges owed to [the facility] as they become due and each of them is obligated to pay all the charges if the other does not. (*emphasis in original*).

Such provisions violate the Nursing Home Reform Law.²⁷ In addition, such clauses are likely to intimidate family members. For example, if family members are told to move their relative out of a Medicare-certified bed (as in Mr. Moran's case), they may be reluctant to challenge the nursing home because they fear incurring personal financial liability. Or if the resident is in the process of applying for Medicaid, the "responsible party" may not want to risk becoming liable for the costs of care in case the Medicaid application is denied or approval is delayed.

Several agreements in the sample require the "responsible party" to agree to assume responsibility for the resident's care in the event of discharge. For example, several agreements contain clauses that state:

In the event that we terminate this Agreement, the Responsible Party, to the extent permitted by law, agrees to take you into his/her custody and obtain for you such services as you may require.

²⁶Podolsky v. First Healthcare Corporation, 58 Cal. Rptr. 2d 89 (Cal. App. 2 Dist. 1996).

²⁷A nursing home may require an individual who has legal access to the resident's funds (for example, under a durable power of attorney) to agree to use the resident's own funds for nursing home care, but may not require the third party to incur personal financial liability. 42 U.S.C. § 1396r(c)(5)(B)(ii); 42 U.S.C. § 1395i-3(c)(5)(B)(ii).

Another facility claims that, in the event of a discharge:

Patient and Family assume full liability for removing Patient from Facility and responsibility for making alternate arrangements for medical care of Patient. Facility shall have no responsibility or liability for removal of Patient from Facility following Patient's or Responsible Party's refusal to vacate the Facility.

These clauses are illegal because it is the facility's responsibility to provide discharge planning for any resident being discharged.²⁸ The facility should not be permitted to shift its responsibility for discharge planning onto the shoulders of a concerned family member. The inclusion of such clauses in the facility's admission agreement is likely to intimidate residents and their family members, and discourage them from exercising their right to obtain adequate discharge planning.

One facility purported to have the resident appoint the administrator and assistant administrator as the resident's attorney-in-fact when:

in [the administrators'] opinion and judgement it is necessary to do so and in connection therewith, to open apparently ordinary business mail, endorse and deposit checks for and on the behalf of the Resident and to apply the proceeds of the same to the benefit of the Resident and generally to act for and on behalf of the Resident . . .

Although it may be appropriate in some cases for the facility to offer to act as attorney-in-fact for a resident (for instance, when no family members or other trusted individuals are able to act in this capacity), such a provision should not be included in the facility's standard admission agreement. This kind of clause is particularly inappropriate in light of the potential conflict of interest between the resident and the facility in connection with the handling of the resident's funds.²⁹

²⁸42 U.S.C. § 1396r(c)(2)(C); 42 U.S.C. § 1395i-3(c)(2)(C); (nursing homes must provide "sufficient preparation and orientation to residents to ensure safe and orderly transfer or discharge from the facility"); 130 CMR 610.220(B)(4) (Massachusetts nursing homes must give notice prior to discharge, specifying, among other things, the location to which the resident is being discharged).

²⁹The New York State Attorney General recently concluded that a nursing home policy requiring incoming residents to sign a power of attorney naming the administrator as agent creates a conflict of interest and violates federal and state law. Attorney General of New York Informal Opinion 97-17 (March, 1997).

IV. LIABILITY FOR COLLECTION COSTS AND ATTORNEY'S FEES

A nursing home may not condition admission on an agreement by the resident or family member to pay collection costs associated with the bill for the services to the resident. The Attorney General's regulations provide that it is a violation of consumer protection law for a nursing home to:

require a resident or a prospective resident, his/her legal representative or next of kin, to agree, as a condition of admission, expedited admission, or continued stay in the facility, to pay attorney's fees or any other costs incurred in collecting payment from the resident.³⁰

COLLECTION COSTS AND ATTORNEY'S FEES	
Requires Resident or "Responsible Party" to Pay Collection Costs and Attorney's Fees:	12 (27%)
Does Not Require Resident or "Responsible Party" to Pay Collection Costs and Attorney's Fees:	33 (73%)

Over a quarter of the facilities surveyed require residents and "responsible parties" to pay both attorneys' fees and other collection costs as a condition of admission. A typical provision states: "Should the account be referred to an attorney or collection agency for collection, the Patient shall pay actual attorney's fees and collection expenses." Another facility places liability directly on a third party: "The Responsible Party agrees to reimburse the Nursing Home for all costs of collecting any overdue payments, including reasonable attorneys fees."

Another facility claims that the agreement to pay collection costs is purely voluntary and therefore not required as a condition of admission:

Discharge for non-payment does not excuse the Resident from liability for all costs of collection and all reasonable attorneys fees. This section . . . is not a condition of admission, but is freely and voluntarily agreed to by the Resident or Legal Representative and the Responsible Party.

³⁰940 CMR 4.04(7).

One facility attempts to make such a provision lawful by including, in parentheses, the clause "to the maximum extent permitted by law." The parenthetical clause does not make this provision valid. This paragraph tends to deceive the average resident, who is likely to interpret it as an absolute right on the part of the nursing home to collect such fees and costs. Similar language in a residential lease has been held to violate the Massachusetts consumer-protection statute.³¹

When read together with clauses that seek to make "responsible parties" personally liable, such provisions are likely to intimidate family members, particularly in case, involving a resident's right to refuse certain transfers. For example, in both Mrs. Moran's and Mr. Smith's cases, the residents' family members were intimidated by the facilities' attempts to discharge the residents, and feared the facilities would sue them personally not only for their parents' nursing home expenses, but also for the facilities' collection costs and attorneys' fees.

V. CHOICE OF PHYSICIAN AND PHARMACY

Under the Nursing Home Reform Law and the Attorney General's regulations, a nursing facility must protect and promote residents' rights to freedom of choice with respect to medical treatment.³² It follows that every legally competent resident has the right to refuse medical treatment. Most of the agreements notify residents of their right to refuse treatment. Some facilities, however, require a resident to consent in advance to virtually all treatment proposed by the facility or the physician. For example, one agreement requires that the resident

authorize nursing home, its agents, employees and medical staff to carry out, as appropriate, routine diagnostic procedures, to administer all treatments, medications or transfusions to the above patient which shall be considered necessary or desirable in the judgment of the attending physician or of the medical staff of the nursing home, including those treatments or procedures in addition to or different from those currently contemplated if they arise from presently unforeseen conditions. (*emphasis added*).

³¹Leardi v. Brown, 394 Mass. 151, 156 (1985) (apartment lease stating that there was no implied warranty of habitability "except so far as governmental regulation, legislation or judicial enactment otherwise requires" violates Chapter 93A).

³²42 U.S.C. § 1396r(c)(1)(A)(i); 42 U.S.C. § 1395i-3(c)(1)(A)(i); 940 CMR 4.08.

Under federal law, nursing homes must allow residents to choose a personal attending physician.³³ The Attorney General's regulations provide that a nursing home may not

require a resident, his/her legal representative or next of kin, as a condition of admission, expedited admission, or continuing stay in the facility, to agree to treatment by a physician chosen by the facility or otherwise to limit the resident's right to choose his/her attending physician.³⁴

RESIDENT'S RIGHT TO CHOOSE PERSONAL PHYSICIAN	
Acknowledges Right to Choose Physician:	26 (58%)
Is Silent Regarding Right to Choose Physician:	15 (33%)
Disclaims Right to Choose Physician:	4 (9%)

Over 40 percent off the agreements in the sample either disclaim or make no mention of the resident's right to choose a physician.

Some agreements make reference to the resident's right to choose a physician, but add that providers must meet the "high standards of care the facility dictates," without specifying those standards. One agreement requires that the resident's physician be granted "admitting privileges" at the nursing home, without specifying the requirements for such privileges. Such provisions could lead a resident to believe that the choice of physicians is limited to those handpicked by the facility.

By contrast, a more consumer-friendly agreement emphasizes the resident's right to choose, while also preserving the facility's right to insist that applicable standards are met.

The choice of the physician is up to the resident and responsible party. The physician must be willing to abide by state rules that govern medical care for nursing homes. [The facility's] staff will meet with any resident's personal physicians to acquaint them with the regulations and policies that apply to physician services.

³³ 42 U.S.C. § 1396r(c)(1)(A)(i); 42 U.S.C. § 1395i-3(c)(1)(A)(i).

³⁴ 940 CMR 4.04(4).

Massachusetts nursing home residents also have the right to choose their own pharmacists. It is an unfair or deceptive act or practice, in violation of the Massachusetts Consumer Protection Act, for a nursing home

to require a resident, his/her legal representative or next of kin, as a condition of admission, expedited admission, or continuing stay in the facility, to purchase medications at or from a pharmacy chosen by the facility, or to otherwise limit the resident's right to select a pharmacy of his/her choice, provided that the prescription complies with all relevant regulations governing pharmacy labeling.³⁵

RESIDENT'S RIGHT TO CHOOSE PHARMACY	
Acknowledges Right to Choose Pharmacy:	10 (22%)
Is Silent Regarding Right to Choose Pharmacy:	32 (71%)
Disclaims Right to Choose Pharmacy:	3 (7%)

About 80 percent of the agreements either disclaim or make no mention of the resident's right to choose a pharmacy. Of those that disclaim this right, one agreement states, for example, that,

All medications are ordered by the nursing staff through the [facility's] pharmacy. Please, DO NOT bring in medications from home.

VI. CHARGES FOR SERVICES PROVIDED

Massachusetts nursing homes are required, upon admission, to notify residents and their legal representatives or next of kin of

the services available in the facility, and the charges for those services, including any charges for services not covered under Medicare or Medicaid or by the facility's per diem rate.³⁶

³⁵940 CMR 4.04(5).

³⁶940 CMR 4.05(1)(a). Under federal law, nursing homes are required to inform to residents who are entitled to Medicaid benefits of what items and services are covered by Medicaid, and the of the charges for those items and services not covered by Medicaid. 42 C.F.R. § 483.10(b)(5)(i).

In other words, before they sign an admission agreement, consumers are entitled to information about what services are covered under the daily rate. They are also entitled to know what services are not covered by the daily rate. Such information about pricing is fundamental to a consumer contract. Although price is not the paramount consideration in selecting a nursing home, it is an important factor for some families.³⁷

SERVICES INCLUDED IN DAILY RATE	
Notifies Residents of Services Included in Daily Rate:	37 (82%)
Does Not Notify Residents of Services Included in Daily Rate:	8 (18%)

SERVICES NOT INCLUDED IN DAILY RATE	
Notifies Residents of Charges for Services Not Included in Daily Rate:	7 (16%)
Does Not Notify Residents of Charges for Services Not Included in Daily Rate:	38 (84%)

More than 80 percent of the agreements studied set out the services covered by the daily rate. However, only 16 percent of the agreements specify the charges for services that are not included in the daily rate, while 84 percent do not inform consumers of the charges for those services.

³⁷ Access to Nursing Homes -- The Experience of Families, Gerontology Program and Institute, University of Massachusetts at Boston, 45-47 (1986).

CONCLUSION AND RECOMMENDATIONS

All 45 agreements examined in this study contain certain provisions that the facilities know or should know to be invalid, or likely to deceive or confuse residents and their family members. Such provisions deprive consumers of the protections afforded by the Nursing Home Reform Law and the Massachusetts Consumer Protection Act.

In the sample, the agreements improperly require residents to waive claims for negligence; contain misleading information about the grounds for transfer or discharge; make no mention of the resident's right to refuse certain transfers; purport to impose personal liability on family members or other "responsible parties;" and unlawfully require residents and family members to pay collection costs and attorney's fees associated with charges to the resident.

As in the case of Mrs. Moran and Mr. Smith, when residents are being discharged against their wishes, they and their family members may refer to the admission agreement and conclude that there is no choice but to leave. Family members may be too intimidated to challenge the facility's actions, particularly when the agreement leads them to believe that they are personally liable for paying for the resident's care.

The following recommendations are offered:

- Information should continue to be made available to consumers by the Executive Office of Elder Affairs, the Attorney General, and the Massachusetts Division of Medical Assistance, among other sources, about the rights afforded to nursing home residents and their family members.
- Armed with this information, residents and their family members may refuse to sign documents presented by nursing homes if the documents contain provisions that conflict with applicable law.
- The nursing home ombudsman program of the Executive Office of Elder Affairs should continue its efforts to advocate for residents when disputes arise. When disputes cannot be resolved informally, the ombudsman should inform residents that free legal assistance is available.
- The Massachusetts Department of Public Health, which is responsible for conducting surveys of nursing homes for compliance with the Nursing Home Reform Law, should take steps to prevent nursing homes from misleading consumers. In particular, surveyors should regularly collect admission agreements and, as necessary, consult with the Attorney General to review admission agreements as part of the survey process.

- The Massachusetts Attorney General, in collaboration with the ombudsman's office, advocates for nursing home residents, and the long-term care industry, should develop a standard admission agreement that would be required for all Massachusetts nursing homes. The agreement should present a clear and complete statement of the resident's rights in a form that is "consumer-friendly." The agreement should be clear, concise, and legible.

Federal and state protections for nursing home residents and their family members begin at the nursing home door. At a minimum, providers should refrain from misleading consumers in their admission documents. The admission agreements should set the stage for a partnership in which providers and advocates actively foster the rights of residents and their family members.

THE GERONTOLOGY INSTITUTE

University of Massachusetts Boston

The Gerontology Institute at the University of Massachusetts Boston addresses social and economic issues associated with population aging. The Institute conducts applied research, analyzes policy issues, and engages in public education. It also encourages the participation of older people in aging services and policy development. In its work with local, state, national, and international organizations, the Institute has four priorities: 1) productive aging, that is, opportunities for older people to play useful social roles; 2) health care for the elderly; 3) long-term care; and 4) economic security for older people. The Institute pays particular attention to the special needs of low-income and minority elderly.

Established in 1984 by the Massachusetts Legislature, the Gerontology Institute is a part of the University of Massachusetts Boston. The Institute furthers the University's commitment to the study and development of social policy on aging, and it supports its educational programs in Gerontology, which are in the College of Public and Community Service. One of these is a multidisciplinary Ph.D. program in Gerontology. Through participation in Institute projects, doctoral students have the opportunity to gain experience in research and policy analysis. Institute personnel also teach in the Ph.D. program.

The largest of the educational programs is the Frank J. Manning Certificate Program in Gerontology, which prepares students for roles in aging services. Most students are over 60 years of age. Each year the Institute assists this program in conducting an applied research project in which students administer a large telephone survey. An advanced certificate program is also supported by the Institute; its in-depth courses focus on specific policy issues.

The Institute also publishes the Journal of Aging & Social Policy, a scholarly, peer-reviewed quarterly journal with an international perspective.

Core funding for the Gerontology Institute is provided by the Massachusetts Legislature. Major projects are funded through grants and contracts.

For more information, visit the University of Massachusetts Boston's web site: www.umb.edu or email: gerontology@umbsky.cc.umb.edu.

